Supreme Court, U.S.
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No. 00-977

In The

# Supreme Court of the United States

ROBERT H. BARRETT,

*Petitioner,*

v.

BOROUGH OF CARLISLE,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Should this Court deny the Petition for Certiorari where the Petitioner's case was properly dismissed by the District Court under Res Judicata and where Petitioner's Motions to seek extension of time to appeal for good cause were brought more than thirty days after expiration of the time to appeal and were found by the District Court and Circuit Court of Appeals to be barred under the appropriate Rules?

Suggested Answer: in the Affirmative.

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## REASONS FOR DENYING THE WRIT

Petitioner, Robert H. Barrett (hereinafter "Barrett" or Petitioner), seeks certiorari from an order entered September 1, 2000 by the United States Court of Appeals for the Third Circuit dismissing his appeal for want of Appellate jurisdiction. (*See* Petition for Writ of Certiorari Appendix Part A, pp. A5 and A6). Petitioner's appeal to the Third Circuit was of an order entered December 22, 1999, in which the United States District Court for the Middle District of Pennsylvania denied the Petitioner's Second Motion For Extension of Time For Filing a Notice of Appeal. (*See* Appendix Part B at B1-B4.) Petitioner's Second Motion was filed more than 30 days after the expiration date of the time otherwise set for bringing an appeal. Pursuant to 28 U.S.C. § 2107(c), the District Court had no jurisdiction to rule upon Petitioner's Second Motion for an Extension of Time. Accordingly, the Third Circuit Court of Appeals did not have jurisdiction to entertain an appeal of the District Court's ruling on the Second Motion, and so held. The time limits provided by 28 U.S.C. § 2107(c) and Fed. R. App. P. 4(a) are mandatory and jurisdictional; therefore, the Federal Courts do not have jurisdiction to grant Petitioner's appeal of the underlying matter.

## COUNTERSTATEMENT OF THE CASE

On July 9, 1998, Petitioner filed suit in Federal District Court for the Middle District of Pennsylvania against the Borough of Carlisle (hereinafter the "Borough"),

alleging that the Borough's historic district is unconstitutional. *See* Appendix Part B at 86-89. The Borough responded by filing a Motion to Dismiss based upon, *inter alia*, the doctrine of *res judicata*, and in support thereof submitted the Order and Opinion of the Cumberland County Court of Common Pleas (Bayley, Appendix H), the Order and Opinion of the Commonwealth Court of Pennsylvania (Brief in Opposition, Appendix A), and the Pennsylvania Supreme Court's Order denying allowance of appeal. *See* Recommended Opinion of Magistrate Smyser at Petitioner's Appendix F, p. F7.

By Order dated July 21, 1999, the District Court dismissed the Complaint. *See* Appendix Part D at D1, D2.

On September 7, 1999, after the period to file an appeal expired, Petitioner filed a Motion To Extend The Time For Filing A Notice Of Appeal (hereinafter "First Motion"), arguing that his incarceration due to his contempt in a state civil case constituted good cause.

The District Court denied Petitioner's request for extension by Order dated October 14, 1999. *See* Appendix Part C at C1, C2. The District Court found that Petitioner's Motion on its face admitted that he was incarcerated until August 17, 1999 and that he became aware of the Court's final appealable order on that date. Therefore, he had time after his incarceration to meet the statutory deadline (August 20, 1999) for filing the notice of appeal. The District Court concluded that Petitioner failed to establish good cause. *Id.* On November 30, 1999, over a month after entry of the District Court's order denying his request for an extension, Petitioner filed his Second Motion For Extension Of Time For Filing A Notice Of

Appeal (hereinafter "Second Motion"). The District Court denied the Petitioner's Second Motion as well, finding, once again, that the Petitioner failed to provide any reasonable explanation of his failure to file a notice of appeal when aware of the Court's final order on August 17, 1999. *See* Appendix Part B at B1-B5 (December 23, 1999 Order).

Petitioner appealed to the United States Third Circuit Court of Appeals, seeking to overturn the District Court's order of December 22, 1999, which was rejected by the aforesaid Order of the Circuit Court dated September 1, 2000.

## ARGUMENT

**Petitioner's Petition for Certiorari should be denied because the District Court properly held that his suit was barred by Res Judicata, and Petitioner failed to preserve his rights to appeal that decision when he was unable to show excusable neglect or good cause pursuant to 28 U.S.C. § 2107(c) for failure to timely file Notice of Appeal.**

The underlying issues of this case have been thoroughly litigated through the Pennsylvania courts. Barrett, in an apparent attempt to re-litigate the issues, filed a Complaint in Federal Court after receiving adverse decisions in the state courts. The District Court dismissed the Federal action on the basis of *res judicata*, among other things. Petitioner did not file a timely notice of appeal of the District Court's order dismissing the Complaint. Instead, he filed two motions to extend time, both of which were properly denied by the District Court. There

is no statutory basis for the appeal to the Third Circuit, which was properly dismissed.

The underlying Complaint in this action revolves around Petitioner's attempt to demolish three residential structures owned by him and located within a historic district in the Borough of Carlisle, Cumberland County, Pennsylvania. The historic district was enacted pursuant to Borough Ordinance and in accordance with mandated statutory and regulatory procedures. After a hearing, the Borough's Historical Architectural Review Board denied the Petitioner's permit request for demolition. *See* Appendix Part F (Magistrate Judge Smyser's Report & Recommendation). Petitioner appealed this denial through the administrative process provided under state law and appealed to the Cumberland County Court of Common Pleas, which denied his appeal. *See* Appendix H. The Commonwealth Court upheld the lower court's decision on appeal and issued a written opinion (Brief in Opposition, Appendix A). Petitioner's subsequent Petition for a Writ of Allocator to the Pennsylvania Supreme Court was also denied. *See* Appendix Part F (Magistrate Judge Smyser's Report & Recommendation at F7).

Petitioner next filed suit in the Federal District Court for the Middle District of Pennsylvania, seeking essentially the same relief that he was unable to obtain in State Court. The Borough filed motions to dismiss on, among others, the grounds of *res judicata*. On or about November 5, 1998, Magistrate Judge Smyser issued a Report and Recommendation in which it was found that the Complaint should be dismissed based upon *res judicata*. *See* Appendix Part F. The Court adopted Magistrate Judge Smyser's Report and Recommendation and dismissed the

Complaint by order dated July 21, 1999. *See* Appendix, Part D.

The time to file a notice of appeal of the Court's July 21, 1999 Order expired on August 20, 1999 pursuant to Fed. R. App. P. 4(a)(1)(A) and 28 U.S.C. § 2107(a). On September 7, 1999, Petitioner filed a motion to extend time for filing a notice of appeal ("First Motion").

By Order dated October 14, 1999, the Court denied the Petitioner's First Motion, finding that the Petitioner did not establish good cause for his request for extension of time.

On November 30, 1999, over two months after the expiration of the time for filing a motion to extend time for excusable neglect or good cause, Petitioner filed a Second Motion for an extension of time to file a notice of appeal. *See* Appendix Part B at 18. Again, the Court denied the Petitioner's Motion and found, *inter alia*, that the Petitioner failed to provide any explanation of why he did not file a notice of appeal when he became aware of the Court's final Order on August 17, 1999. *See* Appendix Part B at 4-6.

The District Court found, on two occasions, that the Petitioner's failure to file a timely notice of appeal was not for good cause or excusable neglect. Petitioner failed to provide a credible reason for overruling the District Court's decision. 28 U.S.C. § 2107(c) provides that the District Court *may* extend the time for appeal upon a showing of excusable neglect or good cause. *See* 28 U.S.C. § 2107(c). The granting of an extension within the 30 day time period is clearly discretionary; Petitioner fails to

produce any authority to show that the District Court abused its discretion.

Furthermore, no authority has been presented to show that Petitioner was permitted by law to bring the Second Motion. The Second Motion was brought well after the expiration of the 30-day statutory period. While the District Court did rule on the Second Motion, the District Court did not have jurisdiction to do so. The Third Circuit Court of Appeals acknowledged these facts in its denial of Petitioner's requests.

## CONCLUSION

For the reasons stated herein, Respondent Borough of Carlisle prays that this Honorable Court will deny Petitioner's Petition for Certiorari.

Respectfully submitted,

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DATED: January 15, 2001

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

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| ROBERT H. BARRETT, | : | |
| Appellant | : | No. 1431 C.D. 1997 |
| v. | : | Submitted: November 21, 1997 |
| BOROUGH OF CARLISLE | : | |

BEFORE: HONORABLE JAMES GARDNER COLINS,
President Judge
HONORABLE ROCHELLE S. FREEDMAN,
Judge
HONORABLE SAMUEL L. RODGERS,
Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FREEDMAN FILED: JANUARY 29, 1998

Robert H. Barrett (Barrett) appeals from an order of the Court of Common Pleas of Cumberland County (trial court) which (1) denied his petition for a hearing de *novo*, (2) denied his petition for an order directing the Pennsylvania Historical and Museum Commission (Commission) to produce its records from 1975, and (3) dismissed Barrett's appeal from the decision of the Carlisle Borough Council (Council) denying his demolition permit. We affirm.

Barrett owns three homes located at 134, 136, and 138 East High Street in the Borough of Carlisle (Borough).[1]

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[1] All three properties are located in the Carlisle Historic Preservation District, created August 14, 1975 by Carlisle Borough Ordinance No. 1197. (Trial court op. at 2.)

(Trial court op. at 1.) On February 12, 1996, Barrett applied to the Borough for a dual building permit to "demolish [the three] buildings, fill cellar, grade." (R.R. at 10a-13a.) A hearing was held before the Borough Historical and Architectural Review Board (Board) on March 18, 1996, which voted unanimously to recommend that Council deny Barrett's demolition permit application on the grounds that the three properties are historically and architecturally significant under Section 255-132 of the Borough zoning ordinance.[2] (R.R. at 73a-75a.) At a

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[2] Section 255-132 of the Borough zoning ordinance provides:

**§ 255-132. Demolition.**

A. Intent. The intent of this section is to ensure that valuable historic resources are not permanently destroyed unless there are no reasonable alternatives available.

B. This section shall apply to any existing building or portion of such building within the Historic District that the Borough Council determines, based upon the recommendation of the Board, is highly important to the historic character and continuity of that portion of the Historic District or is by itself a highly important architecturally historic resource.

C. No building defined by Subsection B above shall be demolished unless one (1) of the following is satisfied, in the terms of the Borough Council, based upon the recommendations of the Board:

(1) That the applicant proves that the demolition is needed to clear the land for a project of special public benefit that would greatly outweigh the loss of the historical resource;

(2) That the applicant proves that no reasonable beneficial use of the building is possible; or

(3) That the applicant proves that the denial of the demolition would greatly result in unreasonable economic hardship to the owner.

hearing held on April 8, 1996, Council considered the report and recommendation of the Board and voted to deny Barrett's permit. (R.R. at 573a-75a.)

Barrett appealed Council's denial of his demolition permit to the trial court.[3] Additionally, Barrett filed two petitions; in the first, Barrett requested that the trial court hear his case de *novo* because the record before Council was incomplete, and in the second, Barrett sought an order directing the Commission to produce records leading to the certification of the Borough historic district, contending that such records would help him establish his case. (Trial court op. at 11-12.) The trial court denied both petitions, affirmed Council's decision and dismissed Barrett's appeal.

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[3] The Borough filed a motion to quash Barrett's appeal, maintaining that, instead of filing an appeal to the trial court, Barrett's sole avenue of relief was to appeal from the denial of the demolition permit to the Borough Zoning Hearing Board. (R.R. at 579a.) The trial court dismissed the Borough's motion to quash. (R.R. at 586a.)

On appeal to this court,[4] Barrett raises two issues for our review. First, Barrett argues that the certification of the Borough Historic District was improper and, second, Barrett contends that, having certified the district, the inclusion of his property in that district without his consent and/or the refusal of Council to issue his requested demolition permit constituted an unconstitutional taking of his property.[5] We disagree.

With regard to the second issue, we conclude that neither the inclusion of Barrett's property in the historic district nor the denial of his demolition permit application resulted in an unconstitutional taking of his property. In *Penn Central Transportation Company v. New York*

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[4] Pursuant to Section 754(b) of the Local Agency Law, when a complete record is made before the local agency, the trial court's scope of review is limited to a determination of whether there has been an error of law, whether constitutional rights have been violated, and whether the necessary findings of fact are supported by substantial evidence. Section 754(b) of the Local Agency Law, 2 Pa.C.S. § 754(b); *City of Philadelphia v. Tax Review Board*, 628 A.2d 1220 (Pa. Cmwlth. 1993). Substantial evidence is such relevant evidence that a reasonable person might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983). Where, as here, the trial court takes no additional evidence, our scope of review is the same as that of the trial court. *City of Philadelphia*.

[5] In the "Statement of the Questions Involved" portion of his brief, Barrett has indicated five issues for our review, followed by a twenty page "laundry list" of reasons why he should prevail. We recognize that Barrett is proceeding pro se before this court and, thus, we make allowances in the interpretation and discussion of his inartful presentation of the issues involved. From a careful review of his entire brief, we have been able to glean these issues as presented for our review.

*City*, 438 U.S. 104 (1978), the United States Supreme Court held that the historic designation of property without the owner's consent does not amount to a taking under the Fifth and Fourteenth Amendments to the United States Constitution,[6] but is rather a restriction on the owner's use of that property. Our supreme court has followed this holding, and it is now well-settled in Pennsylvania that "designation of a privately owned building as historic without the consent of the owner is not a taking under the Constitution of this Commonwealth." *United Artists' Theater Circuit. Inc. v. City of Philadelphia*, 535 Pa. 370, 386, 635 A.2d 612, 620 (1993). Moreover, a municipality's refusal to issue a demolition permit to the owner of property included in a historic district does not necessarily constitute an unlawful taking. *See Park Home v. City of Williamsport*, 545 Pa. 94, 680 A.2d 835 (1996); *City of Pittsburgh v. Weinberg*, 544 Pa. 286, 676 A.2d 207 (1996); *United Artists' Theater Circuit*. In *Weinberg*, our supreme court recognized that when enacting historic district regulations the government must not employ means "unduly oppressive upon the property holder, considering the economic impact of the regulation. . . . " *Weinberg*, 544 Pa. at 293, 676 A.2d at 211 (quoting *United Artists' Theater Circuit*). Thus, applying *Weinberg*, in *Park Home* our

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[6] The Fifth Amendment to the United States Constitution, as applied to state and local governments through the Fourteenth Amendment, provides that no person shall be "deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Additionally, the first section of the Fourteenth Amendment maintains that no "State [shall] deprive any person of life, liberty, or property, without due process of law."

supreme court concluded that, where a property owner who was denied a permit to demolish property included in a historic district failed to establish economic hardship by showing a deprivation of the profitable use of his property, no unlawful taking had occurred.

Based on *Park Home*, Barrett can only succeed on his claim that an unconstitutional taking of his property has occurred by presenting evidence to show that the Borough's historic designation of his property imposed an economic hardship upon him, or that it prevented a reasonable and beneficial use of his property. Because he has failed to present any evidence to sustain this burden, we agree with the trial court's conclusion that neither the inclusion of Barrett's three lots within the Borough Historic District nor the refusal to issue his demolition permit was an unconstitutional taking or a denial of due process rights.

With regard to Barrett's challenge to the certification of the Borough Historic District by the Commission, we conclude, as did the trial court, that this claim is time barred by The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, as *amended*, 53 P.S. § 46010, which limits the appeal period after the certification of a historic district to thirty days.[7] Barrett argues that he should not be bound by this thirty day period because there was an

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[7] 53 P.S. § 46010 states that "[c]omplaint as to the legality of any ordinance or resolution may be made . . . by any person aggrieved[ ] within thirty days after the enactment of any ordinance or the adoption of any resolution. . . . " Here, the Commission adopted the resolution declaring the Borough Historic District on October 1, 1975, (Trial ct. op. at 7), and, thus, Barrett's challenge, now occurring over twenty-two years later, is untimely.

unconstitutional taking; however, because of our determination that a taking in violation of the constitution has not occurred, Barrett 's contention must fail.

Accordingly, for the foregoing reasons, we affirm.

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

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| ROBERT H. BARRETT, | : | |
| Appellant | : | |
| v, | : | No. 1431 C.D. 1997 |
| BOROUGH OF CARLISLE | : | |

ORDER

AND NOW, this 29th day of JANUARY, 1998, the order of the Court of Common Pleas of Cumberland County, at No. 96-2446, dated May 5, 1997, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge